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**Lee Gee Hian v Public Prosecutor**

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL  
NO P-05(M)-16-01 OF 2019  
KAMALUDIN MD SAID, NORDIN HASSAN AND HASHIM  
HAMZAH JJCA  
11 NOVEMBER 2021

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*Criminal Procedure — Appeal — Appeal against conviction and sentence  
— Whether trial judge erred in finding that witness was credible — Whether  
finding on element of possession was wrong in law — Whether prosecution proved  
knowledge of the drugs — Whether conviction safe — Dangerous Drugs Act  
1952 s 39B(1)(a)*

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*Evidence — Adverse inference — Non-production of evidence at trial  
— Whether inference could be drawn for non-production of CCTV footage  
— Whether there was withholding or suppression of evidence — Whether  
non-calling of witness created gap in prosecution's case — Evidence Act 1950  
s 114(g)*

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This was the appellants appeal against the conviction and sentence of the learned High Court judge. The appellant was seen exiting the lift of a hotel whilst carrying two bags on his shoulder. SP7 accosted the appellant and introduced himself as a police officer. The appellant was shocked when SP7 showed his police authority card. The appellant was then arrested by the police. SP7 examined the two bags which were carried by the appellant. Upon

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examination of the first bag, SP7 found two sealed tea plastic packets with the writing 'GUANYINGWANG'. SP7 then opened both the plastic packets which was found to contain a transparent plastic packet containing crystalline substances suspected to be dangerous drugs. On the examination of the second bag, SP7 found that it contained two packets of empty plastics packet, a sealer, a digital weighing scale and a plastic spoon. SP7 also confiscated from the appellant a receipt under the appellant's name and two access cards of the hotel. The appellant was then brought to Room 213 at the same level and the door was opened by SP7 using the access card found from the appellant. Nothing incriminating was, however, found in the said room. The crystalline substances

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were, upon analysis, were confirmed to contain 1,564.3g of methamphetamine, a dangerous drug listed under the First Schedule of the Dangerous Drugs Act 1952. The appellant was subsequently charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). At the close of the prosecution's case, the learned trial judge

found that the prosecution had proved the element of possession independent of the presumption under s 37(d) of the DDA. In coming to this finding, the trial judge accepted the evidence of SP7 that the drugs were found in the first bag carried by the appellant when he exited the lift at level 2 of the hotel. Hence, it was the trial judge's finding that the appellant had physical possession of the bag and the dangerous drugs in it. The trial judge had also considered the conduct or reaction of the appellant where he was shocked when SP7 introduced himself as a police officer. Having weighed this reaction with the circumstances of the case, the inference made by the trial judge was that the appellant had the knowledge of the drugs in the said bag. Further, as the amount of drugs was far higher than the amount which triggers the presumption of trafficking under s 37(da) of the DDA, the trial judge had invoked the said presumption which presumed that the appellant was trafficking the said dangerous drugs until the contrary was proved. In the circumstances, the trial judge found that the prosecution had established a prima facie case against the appellant and therefore called the appellant to enter his defence. The appellant's version was that: (a) the bags were found by the police in Room 213 and at no time was the appellant was carrying the said bags; (b) the bags belong to his friend, one Lim Koon Kooi ('Lim') and Room 213 was rented by him for Lim; and (c) Lim carried the two sling bags that were later seized by the police. The appellant further explained that at the time of the incident, Lim had already checked into the said room and the appellant, together with SD2 and SD3, were at the lobby waiting for Lim to have dinner together as promised by the appellant. However, when Lim met them at the lobby, he told them that he left his bag which contained his wallet and handphone in his room. The appellant then volunteered to take Lim's bag from the room and took the access cards to the room from him. On the way to Room 213, near Room 205, the appellant was arrested by the police and was taken to Room 213. Both SD2 and SD3 corroborated the appellant's story that the two bags belonged to Lim. The trial judge decided that the evidence of the appellant, SD2 and SD3 were only a bare denial and an afterthought which failed to rebut the presumption of trafficking under s 37(da) and had failed to raise any reasonable doubt to the prosecution's case. The trial judge thus convicted the appellant and sentenced the appellant to death. Hence the present appeal on the grounds, inter alia, that the: (i) trial judge erred in his finding that SP7 was a credible witness and as such the further finding of element of possession of the drugs by the appellant based on the evidence of SP7 was wrong in law; (ii) non-calling of Lim as prosecution's witness had raised a gap in the prosecution's case; (iii) non-production of the full CCTV footage by the prosecution attracted the application of adverse inference against the prosecution under s 114(g) of the Evidence Act 1950; (iv) prosecution had failed to prove that the appellant had knowledge of the drugs in the bag; (v) prosecution had failed to obtain any DNA or fingerprints on the exhibits tendered in court; and (vi) trial judge had failed to properly

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- A consider the defence's case through the evidence of the appellant, SD2 and SD3.

**Held**, dismissing the appeal:

- B (1) With the benefit of the audio-visual advantage in hearing the evidence of SP7, including the vigorous cross-examination of SP7 by counsel for the appellant, the trial judge, at the end of the prosecution's case, had made his finding that SP7 was a credible witness and accepted his evidence.
- C There was no overriding error on part of the trial judge in his assessment as to the credibility of SP7 and the acceptance of his evidence. As such, the appellant's contention that SP7 was not a credible witness merely because of his evidence with regards to Lim's car that was seized at the hotel was without merit (see paras 22 & 25).
- D (2) The appellant was seen exiting the lift at level 2 of the hotel, alone, whilst carrying the bag that was later found to contain dangerous drugs. Clearly, the appellant had control or custody of the bag and the impugned drugs in the said bag. On the evidence as established by the prosecution and in light of the evidence that the appellant completely denied carrying the said bag, the court found that there was no error committed by the trial judge as regard to the appellant's knowledge of the impugned drugs and the trial judge's finding that the prosecution had proved that the appellant was in possession of the drugs (see paras 30 & 34).
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- F (3) It was an established fact that the prosecution had tendered the CCTV footage of the lobby, at level 2 and the parking entry of the said hotel. SP6, the hotel's IT executive had confirmed in court that there was no other CCTV recording other than the ones tendered and played in court. SP6 also confirmed that there was no CCTV coverage in front of Room 205 where the appellant was arrested and the CCTV footage of the lobby at the relevant time were duly tendered in court. There was no withholding or suppression of evidence by the prosecution which could attract the application of s 114(g) of the Evidence Act. The appellant's contention of the non-production of full CCTV footage by the prosecution and the submission that adverse inference was applicable against the prosecution were without basis and untenable (see paras 36–37 & 39).
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- I (4) It was settled law that forensic evidence including DNA and fingerprints was only corroborative evidence and its absence did not affect the prosecution's case when there were other direct or circumstantial evidence which could establish its case. For the offence in the present case, the element of possession and trafficking of the drugs had been proved with the evidence of all the prosecution's witnesses in particular SP7. As such, the absence of any forensic evidence did not create any gap in the prosecution's case. Further, ownership of the drugs in the present

case was not a relevant consideration as the appellant was charged for trafficking in dangerous drugs. All the elements with regards to the offence committed by the appellant had been proved by the prosecution. As such, the ownership of the impugned drugs did not in any manner assist the defence case (see paras 42 & 45).

- (5) Having considered the totality of evidence adduced by the prosecution and the finding by the trial judge on the credibility of its witnesses including SP7, the court was of the considered view that there was no gap in the prosecution's case. The appellant contention on this issue was bereft of any merit (see para 51).
- (6) The trial judge had sufficiently evaluated the evidence of the appellant, SD2 and SD3. The trial judge in evaluating the defence case, had considered the totality of evidence and eventually made his findings that the defence had failed to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities and failed to raise any reasonable doubt on the prosecution's case. There was no appealable error in the present case or any misdirection of law or facts. The appellant's conviction was safe (see paras 53 & 57).

**[Bahasa Malaysia summary]**

Ini adalah rayuan perayu terhadap sabitan dan hukuman oleh hakim Mahkamah Tinggi yang bijaksana. Perayu dilihat keluar dari lif sebuah hotel sambil membawa dua beg di bahunya. SP7 telah mendekati perayu dan memperkenalkan dirinya sebagai seorang pegawai polis. Perayu terkejut apabila SP7 menunjukkan kad kuasa polis beliau. Perayu kemudiannya ditahan oleh polis. SP7 meneliti dua beg yang dibawa oleh perayu. Setelah memeriksa beg pertama, SP7 menemui dua bungkusan plastik teh tertutup dengan tulisan 'GUANYINGWANG'. SP7 kemudian membuka kedua-dua bungkusan plastik yang didapati mengandungi bungkusan plastik lutsinar mengandungi bahan kristal disyaki dadah berbahaya. Pemeriksaan beg kedua, SP7 mendapati ia mengandungi dua bungkusan plastik kosong, satu pengedap, penimbang digital dan satu sudu plastik. SP7 juga merampas daripada perayu satu resit di bawah nama perayu dan dua kad akses hotel. Perayu kemudiannya dibawa ke bilik 213 di aras yang sama dan pintu dibuka oleh SP7 menggunakan kad akses yang ditemui daripada perayu. Walau bagaimanapun, tiada apa-apa yang menyalahkan ditemui di dalam bilik tersebut. Bahan kristal tersebut, setelah dianalisis, disahkan mengandungi 1,564.3g methamphetamine, dadah berbahaya yang disenaraikan di bawah Jadual Pertama Akta Dadah Berbahaya 1952. Perayu kemudiannya didakwa mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada akhir kes pendakwaan, hakim perbicaraan yang bijaksana mendapati bahawa pihak pendakwaan telah membuktikan unsur pemilikan bebas daripada anggapan di bawah s 37(d) ADB. Dalam membawa kepada dapatan ini, hakim perbicaraan menerima keterangan SP7 bahawa dadah

- A tersebut ditemui dalam beg pertama yang dibawa perayu semasa beliau keluar dari lif di aras 2 hotel. Oleh itu, ia adalah dapatan hakim perbicaraan bahawa perayu mempunyai milikan fizikal beg tersebut dan dadah berbahaya di dalamnya. Hakim perbicaraan juga telah mempertimbangkan kelakuan atau reaksi perayu di mana beliau terkejut apabila SP7 memperkenalkan dirinya sebagai pegawai polis. Setelah menimbang reaksi ini dengan keadaan kes, inferens yang dibuat oleh hakim perbicaraan adalah perayu mempunyai pengetahuan tentang dadah di dalam beg tersebut. Selanjutnya, memandangkan jumlah dadah adalah jauh lebih tinggi daripada jumlah yang membangkitkan anggapan mengedar di bawah s 37(da) ADB, hakim perbicaraan telah menggunakan anggapan tersebut dengan menganggap perayu mengedar dadah berbahaya tersebut sehingga sebaliknya telah dibuktikan. Dalam keadaan itu, hakim bicara mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan oleh itu memanggil perayu untuk membela diri. Versi perayu adalah: (a) beg-beg tersebut ditemui oleh polis di dalam bilik 213 dan perayu sama sekali tidak membawa beg-beg tersebut; (b) beg tersebut adalah milik rakannya, seorang Lim Koon Kooi ('Lim') dan bilik 213 telah disewa olehnya untuk Lim; dan (c) Lim membawa dua beg sandang yang kemudiannya dirampas oleh polis. Jelas perayu lagi, ketika kejadian, Lim telah pun mendaftar masuk ke dalam bilik tersebut dan perayu, bersama SD2 dan SD3, berada di lobi menunggu Lim untuk makan malam bersama seperti yang dijanjikan oleh perayu. Bagaimanapun, apabila Lim menemui mereka di lobi, beliau memberitahu mereka bahawa beliau tertinggal begnya yang mengandungi dompet dan telefon bimbit di dalam biliknya. Perayu kemudian menawarkan diri untuk mengambil beg Lim dari bilik dan mengambil kad akses ke bilik daripadanya. Dalam perjalanan ke bilik 213, berhampiran bilik 205, perayu telah ditangkap oleh polis dan dibawa ke bilik 213. Kedua-dua SD2 dan SD3 menguatkan cerita perayu bahawa kedua-dua beg tersebut adalah milik Lim. Hakim perbicaraan memutuskan bahawa keterangan perayu, SD2 dan SD3 hanyalah penafian kosong dan pemikiran semula yang gagal menyangkal anggapan pengedaran di bawah s 37(da) dan telah gagal menimbulkan sebarang keraguan munasabah kepada kes pendakwaan. Hakim perbicaraan dengan itu mensabitkan perayu dan menjatuhkan hukuman mati kepada perayu. Oleh itu rayuan semasa adalah atas alasan, antara lain, bahawa: (i) hakim perbicaraan telah terkhilaf dalam dapatannya bahawa SP7 adalah saksi yang boleh dipercayai dan oleh itu dapatan lanjut unsur pemilikan dadah oleh perayu berdasarkan keterangan SP7 salah dari segi undang-undang; (ii) dengan tidak memanggil Lim sebagai saksi pendakwaan telah menimbulkan jurang dalam kes pendakwaan; (iii) ketidakkemukaan rakaman CCTV penuh oleh pihak pendakwaan membangkitkan penggunaan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950; (iv) pihak pendakwaan telah gagal membuktikan bahawa perayu mempunyai pengetahuan tentang dadah di dalam beg tersebut; (v) pihak pendakwaan telah gagal mendapatkan apa-apa DNA atau cap jari pada ekshibit yang dikemukakan di mahkamah;

dan (vi) hakim perbicaraan telah gagal mempertimbangkan dengan sewajarnya kes pembelaan melalui keterangan perayu, SD2 dan SD3.

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**Diputuskan,** menolak rayuan:

- (1) Dengan manfaat kelebihan audio-visual dalam mendengar keterangan SP7, termasuk pemeriksaan balas SP7 yang panjang oleh peguambela perayu, hakim perbicaraan, pada akhir kes pendakwaan, telah membuat keputusannya bahawa SP7 adalah saksi yang boleh dipercayai dan menerima keterangannya. Tidak ada kesilapan yang melampau di pihak hakim perbicaraan dalam penilaiannya tentang kredibiliti SP7 dan penerimaan keterangannya. Oleh itu, dakwaan perayu bahawa SP7 bukan saksi yang boleh dipercayai semata-mata kerana keterangannya berhubung kereta Lim yang disita di hotel adalah tanpa merit (lihat perenggan 22 & 25).
- (2) Perayu dilihat keluar dari lif di aras 2 hotel, seorang diri sambil membawa beg yang kemudiannya didapati mengandungi dadah berbahaya. Jelasnya, perayu mempunyai kawalan atau jagaan ke atas beg dan dadah yang dipersoal di dalam beg tersebut. Mengenai keterangan seperti yang dibuktikan oleh pihak pendakwaan dan berdasarkan keterangan bahawa perayu menafikan sepenuhnya membawa beg tersebut, mahkamah mendapati bahawa tiada kesilapan yang dilakukan oleh hakim perbicaraan berkenaan dengan pengetahuan perayu tentang dadah yang dipersoal dan dapatan hakim perbicaraan bahawa pihak pendakwaan telah membuktikan bahawa perayu memiliki dadah tersebut (lihat perenggan 30 & 34).
- (3) Ia adalah fakta yang mantap bahawa pihak pendakwaan telah mengemukakan rakaman CCTV di lobi, di aras 2 dan pintu masuk tempat letak kereta hotel tersebut. SP6, eksekutif IT hotel telah mengesahkan di mahkamah bahawa tiada rakaman CCTV lain selain yang dikemukakan dan dimainkan di mahkamah. SP6 juga mengesahkan tiada liputan CCTV di hadapan bilik 205 di mana perayu telah ditangkap dan rakaman CCTV lobi pada masa yang berkaitan telah dikemukakan dengan sewajarnya di mahkamah. Tiada penahanan atau penyembunyian keterangan oleh pihak pendakwaan yang boleh menarik pemakaian s 114(g) Akta Keterangan. Pendapat perayu mengenai ketidakkemukaan rakaman CCTV penuh oleh pihak pendakwaan dan penghujahan bahawa inferens bertentangan terpakai terhadap pihak pendakwaan adalah tanpa asas dan tidak boleh dipertahankan (lihat perenggan 36–37 & 39).
- (4) Undang-undang telah mantap bahawa bukti forensik termasuk DNA dan cap jari hanyalah keterangan yang menyokong dan ketiadaannya tidak menjejaskan kes pendakwaan apabila terdapat keterangan langsung atau mengikut keadaan lain yang boleh membuktikan kesnya. Bagi

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- A** kesalahan dalam kes semasa, unsur pemilikan dan pengedaran dadah telah dibuktikan dengan keterangan kesemua saksi pihak pendakwaan khususnya SP7. Oleh yang demikian, ketiadaan sebarang bukti forensik tidak mewujudkan sebarang jurang dalam kes pendakwaan. Selanjutnya, pemilikan dadah dalam kes ini bukanlah pertimbangan yang relevan
- B** kerana perayu didakwa kerana mengedar dadah berbahaya. Semua elemen berhubung kesalahan yang dilakukan oleh perayu telah dibuktikan oleh pihak pendakwaan. Oleh itu, pemilikan dadah yang dipersoal tidak membantu kes pembelaan (lihat perenggan 42 & 45).
- C** (5) Setelah mempertimbangkan keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan dan dapatan hakim perbicaraan mengenai kredibiliti saksi-saksinya termasuk SP7, mahkamah berpendapat bahawa tiada jurang dalam kes pendakwaan. Pendapat perayu mengenai isu ini adalah tanpa sebarang merit (lihat perenggan 51).
- D** (6) Hakim bicara telah menilai secukupnya keterangan perayu, SD2 dan SD3. Hakim perbicaraan dalam menilai kes pembelaan, telah mempertimbangkan keseluruhan keterangan dan akhirnya membuat dapatan beliau bahawa pihak pembelaan telah gagal untuk menyangkal anggapan pengedaran di bawah s 37(da) DDA pada imbalan kebarangkalian dan gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan. Tiada kekhilafan boleh merayu dalam kes ini atau sebarang salah arah undang-undang atau fakta. Sabitan perayu dikekalkan (lihat perenggan 53 & 57) ]
- E**
- F** **Cases referred to**  
*Amri bin Ibrahim & Anor v PP and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)  
*Azhar bin Lazim v PP* [2012] 5 MLJ 1; [2012] 1 LNS 262, CA (refd)  
*Benjamin William Hawkes v PP* [2020] 5 MLJ 417; [2020] 8 CLJ 267, FC
- G** (folld)  
*Chan Pean Leon v PP* [1956] 1 MLJ 237 (refd)  
*Francis Abuchi Odike v PP* [2015] MLJU 816; [2015] 1 LNS 928, CA (refd)  
*Gade Lakshmi Mangraju @ Ramesh v State Of Andhra Pradesh* [2001] AIR SC 2677, SC (refd)
- H** *Ibrahim Mohamad & Anor v PP and another appeal* [2018] supp MLJ 280; [2011] 4 CLJ 113, FC (refd)  
*Lee Ah Seng & Anor v PP* [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (folld)  
*Leow Nghee Lim v Reg* [1956] MLJ 28, HC (refd)  
*Md Zainuddin bin Raujan v PP* [2013] 4 MLJ 596, CA (refd)
- I** *Muhamattakwa Kutha v PP* [2014] 1 LNS 454, CA (refd)  
*Munusamy v PP* [1987] 1 MLJ 492, SC (refd)  
*Pendakwa Raya lwn Klong K'Djoanh* [2016] MLJU 1644, CA (refd)  
*Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 5, FC (refd)  
*PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, FC (refd)

*PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1, FC (refd)

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*See Kek Chuan v PP* [2013] 6 MLJ 885; [2013] 6 CLJ 98, CA (refd)

*Siew Yoke Keong v PP* [2013] 3 MLJ 630, FC (folld)

*Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, HL (refd)

*Yusri bin Pialmi v PP* [2011] 4 MLJ 533, FC (refd)

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**Legislation referred to**

Dangerous Drugs Act 1952 ss 37(d), 37(da), 39B(1)(a), First Schedule

Evidence Act 1950 s 114(g)

**Appeal from:** Criminal Trial No PA-45A-78-11 of 2017 (High Court, Pulau Pinang)

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*Kamarul Hisham Kamaruddin (Ho Cheng En with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the appellant.*

*Ku Hayati bt Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

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**Nordin Hassan JCA (delivering judgment of the court):**

[1] The appellant was charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 (the DDA) in the High Court at Pulau Pinang and the charge read as follows:

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Bahawa kamu pada 18.7.2017, jam lebih kurang 8:15 malam, di laluan berhampiran bilik no. 205, Tingkat 2, Hotel Pearl View, no. 2933 Jalan Baru, Seberang Perai, 13700 Butterworth, di dalam daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya jenis methamphetamine seberat 1564.3 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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The English translation of the charge is set out below:

That you on 18.7.2017, at about 8:15 pm, at walkway near room no. 205, Level 2, Pearl View Hotel, no. 2933 Jalan Baru, Seberang Perai, 13700 Butterworth, in the district of Seberang Perai Tengah, in the state of Pulau Pinang, had trafficked dangerous drugs, to wit 1564.3 grams methamphetamine. Therefore, you have committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act.

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[2] At the conclusion of the trial, the learned trial judge found the appellant guilty of the offence as charged and sentenced the appellant to death by hanging. Aggrieved by the said decision, the appellant filed an appeal to the Court of Appeal.

A [3] Having heard the submissions by both parties and after perusing the records of appeal, we found that there is no appealable error that warrants the intervention of this court. We unanimously dismissed the appellant's appeal and affirmed the decision of the learned trial judge. The reasons for our decisions are the following.

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THE SALIENT FACTS

C [4] Acted on an information received, on 18 July 2017 at about 7pm, Inspector Al Taufek bin Osman (SP7) and his team went to Pearl View Hotel (the hotel) at Seberang Perai and reached there at about 8pm. They then positioned themselves at level 2 of the hotel. Thereafter, the appellant was seen exited the lift of the hotel whilst carrying two bags on his shoulder. SP7 then accosted the appellant and introduced himself as police officer. The appellant was shocked when SP7 showed his police authority card and asked the appellant his identity card. The appellant was then arrested by the police. Thereafter, SP7 examined the two bags which were earlier carried by the appellant. The first bag with label 'Adidas' on it and the second bag with the word 'a' written on it. Upon examination of the first bag, SP7 found two sealed tea plastic packets with the writing 'GUANYINGWANG'. SP7 then open both the plastic packets and found to contain a transparent plastic packet containing crystalline substances suspected to be dangerous drugs. On the examination of the second bag, SP7 found it contained two packets of empty plastics packet, a sealer, a digital weighing scale and a plastic spoon. SP7 also confiscated from the appellant, one receipt under the appellant's name and two access cards of the hotel. The appellant was then brought to Room 213 at the same level and the door was open by SP7 using the access card found from the appellant. Nothing incriminating was found in the said room.

G [5] The two bags and its contents including the packets containing the crystalline substances and other confiscated items were then handed over to the investigation officer, Inspector Izamri bin Bahadun (SP8).

H [6] On 21 January 2016, SP8 sent the crystalline substances to the chemist, Noor Fazlina bt Mohd Fauzi (SP2) for analysis where SP2 confirmed that the crystalline substances contained 1,564.3g of methamphetamine, a dangerous drug listed under the First Schedule of the Dangerous Drugs Act 1952.

I THE FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[7] At the close of the prosecution's case, the learned trial judge found that the prosecution had proved the element of possession independent of the presumption under s 37(d) of the DDA. In coming to this finding, the trial

judge accepted the evidence of SP7 that the drugs were found in the first bag carried by the appellant when he exited the lift at level 2 of the hotel. Hence, it was the trial judge's finding that the appellant had physical possession of the bag and the dangerous drugs in it.

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[8] The trial judge had also considered the conduct or reaction of the appellant where he was shocked when SP7 introduced himself as a police officer. Having weighed this reaction with the circumstances of the case, the inference made by the trial judge was that, the appellant had the knowledge of the drugs in the said bag.

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[9] Further, as the amount of drugs is far higher than the amount which triggers the presumption of trafficking under s 37(da) of the DDA, the trial judge had invoked the said presumption which presumed that the appellant was trafficking the said dangerous drugs until the contrary is proved.

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[10] The trial judge also was satisfied that the crystalline substance analyzed by the chemist in the present case were dangerous drugs as listed under the First Schedule of the DDA 1952.

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[11] In the circumstances, the trial judge found that the prosecution had established a prima facie case against the appellant and therefore called the appellant to enter his defence for the offence of trafficking in dangerous drugs.

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#### THE DEFENCE

[12] The appellant gave his evidence on oath and his version is totally different from the evidence of SP7. His version was that, the bags were found by the police in Room 213 and at no time the appellant was carrying the said bags. In his evidence, he said the bags belong to his friend, Lim Koon Kooi and Room 213 was rented by him for Lim Koon Kooi. He also said the he was present when Lim Koon Kooi arrived at the hotel and saw Lim Koon Kooi carried the two sling bags that were later seized by the police. He further explained that at the time of the incident, Lim Koon Kooi had already check in the said room and the appellant, together with SD2 and SD3, were at the lobby waiting for Lim Koon Kooi to have dinner together as promised by the appellant. However, when Lim Koon Kooi met them at the lobby, he told them that he left his bag which contained his wallet and handphone in his room. The appellant then volunteered to take Lim's bag from the room and took the access cards to the room from him. On the way to Room 213, near Room 205, the appellant was arrested by the police and was taken to Room 213. It was in the said room, the appellant said that the police found the two bags.

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- A** [13] Mukda Pantha (SD2), is the appellant's girlfriend and Tang Seong Soon (SD3) is his friend. Both SD2 and SD3 corroborated the appellant's story that the two bags belong to Lim Koon Kooi.

**B** THE FINDING OF THE TRIAL JUDGE AT THE CLOSE OF THE DEFENCE CASE

- C** [14] The trial judge, having considered the defence's case and the evidence in totality, had made his findings, firstly, it is illogical that Lim Koon Kooi would allowed the appellant to take his bag from the room which later found to contained drugs. It was also the trial judge finding that SP7 was a credible witness, unshaken in his evidence and has no reason to victimise the appellant. Further the trial judge decided that the evidence of the appellant, SD2 and SD3 were only a bare denial and an afterthought which failed to rebut the presumption of trafficking under s 37(da) and had failed to raise any reasonable doubt to the prosecution's case.
- D**

THE APPEAL

- E** [15] In the present appeal, the appellant raised the following issues:
- F** (a) that the trial judge erred in his finding that SP7 was a credible witness and as such the further finding of element of possession of the drugs by the appellant based on the evidence of SP7 is wrong in law;
- (b) the non-calling of Lim Koon Kooi as prosecution's witness had raised a gap in the prosecution's case;
- G** (c) that the non-production of the full CCTV footage by the prosecution attracted the application of adverse inference against the prosecution under s 114(g) of the Evidence Act 1950;
- (d) that the prosecution had failed to prove that the appellant had knowledge of the drugs in the bag;
- H** (e) that the prosecution had failed to obtain any DNA or fingerprints on the exhibits tendered in court, in particular the bags, the tea packets and the plastic packets; and
- (f) that the trial judge had failed to consider properly the defence's case through the evidence of the appellant, SD2 and SD3.

**I** THE CREDIBILITY OF SP7 AND THE ELEMENT OF POSSESSION

[16] On the issue of SP7 credibility, counsel for the appellant submitted that SP7 was not telling the truth in court with regard to the fact that the car belonging to Lim Koon Kooi was at the hotel and was seized by the police. As such, SP7 evidence should not be believed and he is not a credible witness. In

the circumstances, SP7 evidence that he saw the appellant carried the two bags and one of which contained the drugs when the appellant exited the lift at level 2 of the hotel should not be accepted. On the other hand, the appellant's evidence that the bags were found in Room 213 by the police is more credible.

[17] In this regard, it is trite law that the credibility of a witness is best left to the trial judge who had the audio-visual advantage of the witness unless there is good reason not to accept the finding. Further, even there is any contradiction in a witness evidence or even told lies in one or two points, his evidence should not be totally rejected.

[18] On this point, the observation by the Federal Court in *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 are instructive:

[9] The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well established by high authorities. *The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject* (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 (FC); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (FC); *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689; [1999] 2 CLJ 780 (CA)). *It is not the function of an appellate court to make primary findings of facts* (see *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457 (FC). (Emphasis added.)

[19] In the same case, Nik Hashim FCJ further explained as follows:

[13] Having considered the reasons of the Court of Appeal for agreeing with the trial court on the credibility of SP7, I am inclined to agree with it. In coming to such view, I am well aware of the well known principle that in the event of doubt it must be given favourably to an accused person. But this is not the case here. *In the present case, the testimony of SP7, in spite of its infirmities, has impressed the learned trial judicial commissioner to find SP7 to be a witness of truth. In a case of this sort where everything depends on the credibility of a witness about what was said, the view formed by the primary trier of fact, is entitled to great respect and an appellate court lacking the audio-visual advantage enjoyed by the trial court should be slow in disturbing the finding of facts arrived by a trial judge. The finding of credibility of SP7 as a truthful witness by the learned judicial commissioner is a primary finding of fact. Therefore, it is not the function of this court to substitute its finding for that of the trial court.*

A [20] Likewise in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 the Federal Court opined clearly the following:

B [32] *Now, it settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio visual advantage enjoyed by the trial court.*

C [21] This court had also discussed the same issue in the case of *Md Zainuddin bin Raujan v Public Prosecutor* [2013] 4 MLJ 596 and said this:

D [18] *It is within the purview of the learned trial judge's function to assess the credibility of witnesses who gave evidence before him. He had the audio visual advantage of assessing them. We have not. Further, it is also trite law that the appellate courts will always be slow to interfere in matters relating to the credibility of witnesses. It serves no useful purpose for us to again and again list down the line of authorities on this issue.*

E [22] Having discussed the law on this issue, in the present case, with the benefit of the audio-visual advantage in hearing the evidence of SP7, including the vigorous cross-examination of SP7 by counsel for the appellant, the trial judge, at the end of the prosecution's case, had made his finding that SP7 was a credible witness and accepted his evidence. This is reflected in his grounds of judgment where the trial judge said this:

F 62 *Setelah meneliti keseluruhan saksi-saksi pendakwaan, saya berpendapat tidak ada sebab terutamanya SP7 mengadakan cerita yang tidak benar berkaitan apa yang berlaku. Tidak ada sebab mengapa keterangan mereka diragui dan ditolak oleh saya. Tiada sebab untuk saksi-saksi polis ini menganiaya OKT kerana inilah kali pertama SP7 nampak OKT dan menangkap OKT. Pembelaan tidak berjaya membangkitkan motif jahat atau dengki oleh SP7 dan SP8 keatas OKT.*

G [23] Further, having heard the evidence of the appellant and assessed them together with the evidence of SP7, the trial judge concluded the following:

H 92 *Sekali lagi saya tegaskan di sini bahawa SP7 merupakan saksi yang kredibel dan boleh dipercayai. Keterangan yang dikemukakan oleh SP7 tidak berjaya digugat malah tetap kukuh walaupun dalam memberi jawapan kepada soalan yang diajukan oleh peguam OKT yang bijaksana. Jawapan yang diberikan adalah konsisten dengan apa yang sebenarnya berlaku terutamanya di mana dadah ditemui. Tidak ada sebab untuk SP7 menganiaya OKT kerana tidak ada bukti yang berjaya dikemukakan oleh pembelaan sama ada SP7 berdendam atau ada motif serong keatas OKT ...*

I 93 *SP7 bukan merupakan saksi yang berkepentingan tetapi mereka merupakan pegawai penguatkuasa yang telah menjalankan tugas dan tanggungjawab mereka sebagai pegawai kerajaan. Keterangan SP7 adalah boleh dipercayai dan patut dipercayai adalah cukup untuk membuktikan kes pendakwaan (rujuk keputusan Mahkamah Persekutuan dalam kes *Yusri Pialmi v Public Prosecutor*). (Emphasis added.)*

[24] In *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533, the Federal Court states:

The learned trial judge and the majority of the Court of Appeal had found SP2 to be a witness of truth. *SP2 was not an interested witness of truth, but a police officer performing his duties. He had related what he actually saw and did on that day. SP2's evidence is credible and ought to be believed* (see the cases of *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 and *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251). (Emphasis added).

[25] Having viewed this issue in totality, we find there was no overriding error on part of the trial judge in his assessment as to the credibility of SP7 and the acceptance of his evidence. As such the appellant's contention that SP7 was not a credible witness merely because of his evidence with regard to Lim Koon Kooi's car that was seized at the hotel is without merit.

[26] As the evidence of SP7 has been accepted by the trial judge, in particular that the appellant was arrested whilst carrying the bag that contained the impugned drugs, the next issue is whether actual possession of the drugs by the appellant has been proved by the prosecution. This in light of the fact that the trial judge had not invoked the presumption of possession under s 37(d) of the DDA and as such actual possession need to be proved by direct or circumstantial evidence.

[27] It is trite law that in order to prove actual possession, the prosecution has to prove the element of control or custody and knowledge of the impugned drugs. The Federal Court in the case of *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] supp MLJ 280; [2011] 4 CLJ 113 explained the issue of possession in the following manner:

The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. *The physical act of control or custody must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumptions, knowledge has to be proved either by direct evidence or circumstantial evidence.* Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute, possession let alone trafficking. (Emphasis added.)

[28] The meaning of 'control' and 'custody' had been lucidly elaborated by Taylor J in the case of *Leow Nghee Lim v Reg* [1956] MLJ 28 which need no further mention here.

[29] Further, the meaning of 'possession', was also discussed in the often quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, where Thomson J explained that a person is in possession of a thing when he is so

A situated with respect to it and has the power to deal with it as owner when the circumstances arises.

B [30] Coming back to the present case, the appellant was seen exited the lift at level 2 of the hotel, alone, whilst carrying the bag that later found to contained dangerous drugs. Clearly, the appellant had control or custody of the bag and the impugned drugs in the said bag. The next pertinent question is whether the appellant had knowledge of the impugned drugs in the bag.

C [31] On the issue of knowledge, the Federal Court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, quoting with approval the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 said this:

D [19] *The issue of knowledge necessary to establish possession* came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633. In *Warner* the following question was posed to their Lordships:

E Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, *a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.*

[20] At p 367 Lord Reid addressed the issue as follows:

F The object of this legislation is to penalise possession of certain drugs. So, if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. *So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.*

H [21] In the same case Lord Morris answered the question in following manner:

I If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. *If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that*

*someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.*

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[22] *Reverting to the present case, it is therefore incumbent upon to court to scrutinize the entire evidence before the court to see whether an inference can be drawn that he knew about the drugs in the three packages found in the car ...* (Emphasis added.)

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[32] In the same case, Arifin Zakaria FCJ (as His Lordship then was), applied the facts with regard to the issue of knowledge in the following manner:

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*The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.*

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In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at pp 217–218; [1980] 1 MLJ 49 at p 52):

Even if there were no statutory presumptions available to the prosecution, *once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.* (Emphasis added.)

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[33] The trial judge in the present case had made an inference that the appellant had knowledge of the drugs from his conduct and in the circumstances of the case. The appellant was shocked when SP7 introduced himself as police officer whilst the appellant was carrying the bag which contained the drugs. In the trial judge grounds of judgment, this is what his lordship said:

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50 *Dalam kes ini, OKT terkejut apabila SP7 menunjukkan kad kuasa polis dan meminta kad pengenalannya. Kenapa OKT perlu terkejut apabila SP7 memperkenalkan diri sebagai polis? Hanya individu yang melakukan kesalahan atau mengetahui barang salah ada padanya yang terkejut dalam situasi ini. Saya berpendapat reaksi atau tingkah-laku oleh OKT ini merupakan suatu yang relevan di bawah s 8 Akta Keterangan 1950 ...*

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52 *Keterangan ini membolehkan satu inferens dibuat bahawa OKT mempunyai pengetahuan ke atas dadah yang dijumpai dari dalam beg yang disilang di bahunya. OKT perlu dipanggil memberi penjelasan berkenaan reaksinya ini selari dengan peruntukan di bawah s 9 Akta Keterangan.*

A [34] On the evidence as established by the prosecution and in light that the appellant totally denied carrying the said bag, we find no error committed by the trial judge as regard to the appellant knowledge of the impugned drugs and the trial judge finding that the prosecution had proved that the appellant was in possession of the drugs.

B THE PROSECUTION'S FAILURE TO PRODUCE THE FULL CCTV FOOTAGE

C [35] Counsel for the appellant submitted that the prosecution had failed to produce the CCTV footage at the lobby when SD2 and SD3 were said had approached SP7 after the appellant was arrested as well as the CCTV footage at level 2 of the hotel when the appellant was arrested. This, was submitted had attracted the adverse inference against the prosecution under s 114(g) of the Evidence Act 1950.

D [36] On this issue, it is an established fact that the prosecution had tendered the CCTV footage of the lobby, at level two and the parking entry of the said hotel. Five CCTV recordings were played in court and the forensic analysis report of the CCTV recording was also tendered in court and marked as exhibit P28. SP6, the hotel's IT Executive had confirmed in court that there was no other CCTV recording other than the one tendered and played in court. SP6 also explained that not all the CCTV at the hotel were functioning and there was a blind spot in front Room 205 at level two as there was no CCTV coverage. In his evidence, this is what SP6 said:

F TPR: Di mana kedudukan kamera CCTV ini?  
SP6: Kebiasaannya di lobi, semua tempat yang ada tetamu lalu. Dan juga pejabat, depan koridor ke bilik, depan lift, car park entry.

G TPR: *Adakah semua CCTV ini berfungsi?*  
SP6: *Ada yang tidak berfungsi, bermasalah teknikal.*

...  
TPR: Untuk level 2 ada berapa CCTV?

H SP6: 1  
TPR: Dari 1 kamera CCTV?

SP6: Ya.  
TPR: Adakah rakaman di hadapan lift sahaja?

I SP6: Ya.  
TPR: *Adakah rakaman CCTV di hadapan bilik 205?*

SP6: *Spesifik 205 tidak ada sebab 205 di blind spot.*  
TPR: *Maksud blind spot ini?*  
SP6: *Tiada rakaman. Tidak cover.*

...

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TPR: Kamu ditanya 'rakaman CCTV lain untuk masa tersebut ada atau tidak di tempat yang sama' kamu menjawab — SP6: Ada. Tempat mana ada CCTV lain?

SP6: Untuk masa itu memang ada satu recording sahaja.

TPR: Tetapi soalan peguam di tempat sama, apa yang kamu faham?

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SP6: Apa yang faham dari soalan peguam adalah satu CCTV, satu recording for one time. And one time itu saya tersalah faham, saya ingat masa lain sebab dia continue recording. So memang tiada rakaman lain untuk masa itu.

TPR: *Ada CCTV lain di tempat yang sama yang tiada dalam CD ini?*

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SP6: *Tiada.*

[37] Having perused the evidence in relation to this issue, we find that there was no withholding or suppression of evidence by the prosecution which can attract the application of s 114(g) of the Evidence Act. SP6 confirmed that there was no CCTV coverage in front of Room 205 where the appellant was arrested and the CCTV footage of the lobby at the relevant time were duly tendered in court. From the forensic analysis report, P28, 13 pictures of a man carrying bags on his shoulder was seen at the lobby and seven pictures of a man carrying bags was seen at level 2 of the hotel. Although the man's face is unclear but from pictures 6 and 7 from the CCTV recording at level 2 it can be seen that the man was carrying two bags on his shoulder at the material time. Be that as it may, the pertinent point here is that there is no evidence to show the withholding or suppression of evidence by the prosecution for the application of an adverse inference against the prosecution (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617 (FC)).

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[38] The case of *See Kek Chuan v Public Prosecutor* [2013] 6 MLJ 885; [2013] 6 CLJ 98 relied upon by counsel for the appellant to support his contention on this issue can readily be distinguished on its facts. In that case, the prosecution's version was that the appellant who was alone, alighting from his car whilst carrying a bag containing drugs and walked towards the hotel. He was arrested and the bag was seized from his hand. However, the appellant's story was that, when the police came, a person by the name of Ah Fatt, who followed the appellant in the car and was carrying the bag, had threw the bag on the floor and fled the scene leaving the appellant alone. There were 32 CCTV at the hotel including at the lobby but none of the CCTV footage were produced in court. It was held that the CCTV footage at the lobby would verified the prosecution version and the non-production of the same amounted to withholding and suppression of evidence. In the present case, as mentioned earlier, all the relevant CCTV footage were tendered in court and explanation had been given by SP6 that there was no CCTV coverage near Room 205, the place where the appellant was arrested.

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A [39] In the circumstances, we are of the view that the appellant's contention of the non-production of full CCTV footage by the prosecution and the submission that adverse inference is applicable against the prosecution are without basis and untenable.

B [40] We further emphasise here that the non-production of any CCTV  
C footage which is proved unclear, cannot amount to withholding or suppression of evidence that attracts the application of s 114(g). We find support in the Federal Court case of *Benjamin William Hawkes v Public Prosecutor* [2020] 5 MLJ 417; [2020] 8 CLJ 267, where Zabariah Mohd Yusof FCJ, delivering the judgment of the court said this:

D [58] *The CCTV footage was never tendered as the prosecution's exhibit as forming part of the prosecution's case, simply because the footage was not clear and would be of no assistance to the prosecution's case ... Hence, it is understandable why the CCTV footage has never been intended to be part of the prosecution's exhibits or evidence, and thus,*

E [59] *If the CCTV was unclear and unable to assist the prosecution's case, how could it assist the defence case. Therefore, it cannot be said that the CCTV footage would be evidence favourable to the defence.* (Emphasis added.)

#### THE ISSUE OF DNA AND FINGERPRINTS

F [41] The next issue raised by the appellant was that the prosecution had failed to obtain any DNA or fingerprints evidence on the bags or plastics packets that said to contain the dangerous drugs. Counsel for the appellant submitted that this evidence is crucial because the ownership of the drugs has been seriously disputed by the defence and if traces of Lim Koon Kooi's DNA or fingerprints were found on the packets containing the drugs, it corroborates  
G the appellant's version that the bags belong to Lim Koon Kooi and the appellant did not have exclusive possession on the bags.

H [42] It is settled law that forensic evidence including DNA and fingerprints is only corroborative evidence and its absence does not affect the prosecution case when there are other direct or circumstantial evidence which can establish its case. For the offence in the present case, the element of possession and trafficking of the drugs has been proved with the evidence of all the prosecution's witnesses in particular SP7. As such, the absence of any forensic evidence does not create any gap to the prosecution's case.

I [43] This court in *Francis Abuchi Odike v Public Prosecutor* [2015] MLJU 816; [2015] 1 LNS 928 had dealt with the same issue and held as follows:

[28] *Having said that, The DNA evidence or fingerprint lifting are only corroborative evidence in nature when all other important ingredients of the offence, ie, custody and*

*control, actual possession and knowledge are proven. When the evidence are overwhelming, the DNA evidence or contamination thereof becomes irrelevant.* (Emphasis added.)

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[44] In the Supreme Court case of *Gade Lakshmi Mangraju @ Ramesh v State Of Andhra Pradesh* [2001] AIR SC 2677, Thomas J had this to say:

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*Presence of a fingerprint at the scene of the occurrence is a positive evidence. But the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene. If during perpetration of the crime the fingerprint of the culprit could possibly be remitted at the scene it is equally a possibility that such a remnant would not be remitted at all. Hence absence of finger impression is not guarantee of absence of the person concerned at the scene.* (Emphasis added.)

C

(See also *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 5 (FC)).

D

[45] In addition, ownership of the drugs in the present case is not a relevant consideration as the appellant was charged for trafficking in dangerous drugs. All the element with regard to the offence committed by the appellant has been proved by the prosecution. As such, the ownership of the impugned drugs does not in any manner assist the defence case.

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[46] This court had the occasion to deal with this issue in the case of *Pendakwa Raya lwn Klong K'Djoanh* [2016] MLJU 1644 and held as follows:

[33] *Dibawah s 39B(1), apa yang perlu dibuktikan ialah milikan dan kawalan dengan pengetahuan dan bukannya kepunyaan (ownership). Walaupun diandaikan dadah itu kepunyaan Brave, tetapi tertuduh dengan penuh pengetahuan membawanya ke Malaysia dari India, itu sudah cukup untuk memenuhi kehendak s 39B(1) ADB. Isu sama ada Brave atau adik Brave adalah pemilik beg P24, tidak relevan sama sekali bagi pertuduhan di bawah s 39B(1) ADB.* (Emphasis added.)

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#### THE PROSECUTION'S FAILURE TO CALL LIM KOON KOOI AS A WITNESS

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[47] Counsel for the appellant submitted that as there is evidence showing the presence of Lim Koon Kooi at the material time, the prosecution was duty bound to call Lim Koon Kooi to give evidence as his evidence is essential to unfold the narrative of the prosecution's case.

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[48] First and foremost, the prosecution has to establish its case beyond reasonable doubt in order to obtain a conviction against an accused person. In this connection, it is the prosecution's duty to produce sufficient evidence through witnesses or documents admissible and accepted by court. The discretion is placed with the prosecution to decide and call any witness or witnesses to prove its case. Fell short of the required standard of proof for not

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- A calling any relevant witness is the risk the prosecution has to bear which can end up with an acquittal of the accused.

[49] On this issue, it is instructive to make reference to the Federal Court case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 which states:

- B ... It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it (see *Khoo Chye Hin v Public Prosecutor* [1961] MLJ 105 (CA), *Adel Muhamed El Dabah v Attorney General of Palestine* [1944] AC 168, *Public Prosecutor v Datuk Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1). However, that prosecutorial discretion must be
- C subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 19, (SC)). Thus, in *Teoh Hoe Chye v Public Prosecutor Yeap Teong Tean v PP* [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p 229: Nevertheless, the decision whether to call or not to call a
- D witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor*). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of
- E proof beyond reasonable doubt (*Abdullah Zawawi's* case). [43] In other words, in the end it is the sufficiency of the evidence that matters. In the present appeal, we find no such unsatisfactory features or gap in the prosecution's case. Indeed, as is clear in this judgment and for reasons which we have explained we are satisfied that the learned trial judge was right in holding that a prima facie case of trafficking in dangerous
- F drugs had been made out against Siew. (Emphasis added.)

[50] On the same issue, this court in *Muhamattakwa Kutha v Public Prosecutor* [2014] 1 LNS 454 explained as follows:

- G [27] It is pertinent to note that the term 'essential to unfolding the narrative on which the prosecution case is based' (*Seneviratne v R* [1936] 3 All ER 36) does not mean that every witness with relevant testimony have to be called by the prosecution. The jurisprudence does not impose such a burden on the prosecution. The term, relates to the prosecution's burden of proof in a criminal trial. Where the 'narrative' is not adequately set forth, elements of the offence might not be properly proven and the prosecution risks
- H losing its case. We agree with the submission of learned deputy public prosecutor that in the circumstances of this case and as found by the learned trial Judge, there was no gap in the prosecution's case, even without the informer's testimony. (Emphasis added.)

- I [51] In the present case, having considered the totality of evidence adduced by the prosecution and the finding by the trial judge on the credibility of its witnesses including SP7, we are of the considered view that there is no gap in the prosecution's case. As such, the appellant contention on this issue is bereft of any merit.

## FLAWED ASSESSMENT OF THE DEFENCE'S EVIDENCE

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[52] Finally, counsel for the appellant contended that the trial judge did not properly consider the evidence by the appellant, SD2 and SD3.

[53] With regard to this issue, after having perused the trial judge's grounds of judgment, we find the trial judge had sufficiently evaluated the evidence of the appellant, SD2 and SD3 as seen at paras 78 until 102 of the grounds of judgment. The trial judge in evaluating the defence case, had considered the totality of evidence and eventually made his findings that the defence had failed to rebut the presumption of trafficking under s 37(da) on the balance of probabilities and failed to raise any reasonable doubt on the prosecution's case.

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[54] At para 103 of the grounds of judgment, the trial judge concluded as follows:

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Setelah memberi pertimbangan kepada keseluruhan kes pendakwaan *dan setelah membuat analisa yang terperinci ke atas kes pembelaan*, maka adalah menjadi keputusan saya bahawa pihak pembelaan telah gagal menyangkal anggapan bahawa OKT memiliki dadah sebagaimana pertuduhan bagi tujuan pengedaran di bawah s 37(da)(xvi) Akta 234 di atas imbalan kebarangkalian dan pihak pembelaan juga gagal menimbulkan keraguan yang munasabah ke atas pertuduhan-pertuduhan yang dikenakan ke atas OKT ...

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[55] Further, in *Azhar bin Lazim v Public Prosecutor* [2012] 5 MLJ 1; [2012] 1 LNS 262, this court opined the following:

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[27] *A credible defence is a defence that answers the evidence of the prosecution. It is purely a question of fact whether the explanation of the defence is capable of raising a reasonable doubt.* (Emphasis added.)

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[56] In the present case, we find the trial judge had properly consider the evidence by the appellant, SD2 and SD3 and the defence also had not answered the evidence of the prosecution. Here, the trial judge had not erred in evaluating the defence case.

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## CONCLUSION

[57] In conclusion, we are of the view that there is no appealable error in the present case or any misdirection of law or facts. The appellant's conviction is safe and therefore we unanimously dismissed the appellant's appeal and affirmed the conviction and sentence of the High Court.

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**A** *Appeal dismissed; conviction and sentence affirmed.*

Reported by K Selvaraju

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